

IN ARBITRATION PROCEEDINGS  
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy	)	
	)	
Between	)	
	)	
CITY AND COUNTY OF SAN FRANCISCO,	)	
	)	
Employer,	)	OPINION AND AWARD
	)	
and	)	FRANK SILVER,
	)	Arbitrator
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION, LOCAL 790,	)	ERD No. 90-05-1330
	)	
Union.	)	March 31, 2006
	)	
RE: Environmental Control Officers	)	
	)	

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This dispute arises under the Collective Bargaining Agreement between the above-named parties. Pursuant to the terms of the Agreement, this Arbitrator was selected to hear the evidence and to determine the issues.

A hearing was conducted on October 21, 2005, in San Francisco, California, at which time the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. Both parties submitted closing briefs which were received on January 23, 2006.

## APPEARANCES:

On behalf of the Employer: Thornton C. Bunch, Jr., Deputy City Attorney

On behalf of the Union: Anne I. Yen, Weinberg, Roger & Rosenfeld

## ISSUE

Did the City violate the Agreement, including the Work Preservation Agreement, with respect to the use of employees from non-SEIU bargaining units to participate in citation walks pursuant to the Mayor's February 17, 2005 announcement of a new anti-littering campaign? If so, what is the appropriate remedy?<sup>1</sup>

## PERTINENT PROVISIONS OF THE AGREEMENT

### A. 2003-2004 CITY-SEIU Work Preservation Agreement

**III.2.b.ii. Bargaining Unit Work:** The City agrees that it will not assign work currently performed by SEIU represented employees to any other bargaining unit.

### B. The Collective Bargaining Agreement

¶ 8. Upon adoption the provisions of this Agreement shall supersede and control over contrary or contradictory Charter provisions, ordinances, resolutions, rules or regulations of the City to the extent permissible by Charter Section A8.409.

¶ 10. Pursuant to the provisions of the Meyers-Milias-Brown Act, as amended, the City agrees to meet and confer with the Union in advance regarding any proposed changes in working conditions within the scope of representation.

¶ 11. Except to the extent there is contained in this Agreement express and specific provisions to the contrary, nothing herein shall be construed to restrict any legal city rights concerning direction of its work force, or consideration of the merits, necessity or organization of any service or activity provided by the City. The City shall also have the right to . . . exercise control and discretion over the city's organization and operations. The City may also relieve employees from duty due to lack of work or funds, and may determine the methods, means and personnel by which the City's operations are to be conducted.

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## FACTS

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<sup>1</sup> The issue has been formulated by the Arbitrator, based on the record and the parties' proposed issues. The initial grievance referenced the assignment of litter enforcement duties to employees both inside and outside the Local 790 bargaining unit. However, as discussed on the record and in post-briefing correspondence between counsel, the issue in this arbitration is limited to the question of assigning these duties to non-bargaining unit personnel.

During the 2003-2004 fiscal year, the City laid off a number of Class 8280 Environmental Control Officers (ECOs) employed in Department of Public Works. On or about January 15, 2005, the City eliminated the remaining ECO positions, along with 8282 Senior ECO positions in the Department. At that time, there were five regular ECOs, who were subject to layoff, in addition to four as-needed ECOs. Prior to the layoff, the parties met and conferred regarding the impact of the layoff, but those discussions did not include the subject matter of the anti-littering campaign which was announced by the Mayor on February 17, 2005, and which prompted the current grievance (Tr. 12-13).<sup>2</sup> There was no grievance filed over the layoff itself.

According to the ECO class specification, the job entailed enforcing compliance with municipal codes relating to litter and environmental controls, investigating complaints, interviewing witnesses, issuing citations, and making court appearances. Job duties included conducting educational campaigns by making presentations or one-on-one contacts with merchants, property owners, and other members of the public. (Un. Ex. 3.) According to former ECO Jorge Montiel, no employees other than ECOs regularly performed litter enforcement work, and ECOs would in fact be called by the police, fire, and parks and recreation departments to enforce litter abatement.<sup>3</sup>

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<sup>2</sup> The Work Preservation Agreement establishes an Internal Job Placement Committee, the primary purpose of which is to find open, vacant, budgeted positions for employees who have been laid off. That committee met, and as a result, the ECOs who were laid off were placed in other positions, inside and outside the Department, although some employees suffered a period of layoff before another position was found and some of the jobs were at lower wage rates. The record is not clear whether the parties met and conferred separately from the discussions in this committee.

<sup>3</sup> Montiel noted that laborers in the Public Works Department would also receive service requests related to litter, but from the context it appears that laborers were primarily responsible for cleaning up litter and other garbage, while ECOs performed code enforcement duties (Tr. 54). He testified that Edwin Lee, the Public Works director, explained that in laying off ECOs, he had to choose between picking up garbage and enforcing the anti-litter statutes, and he made the decision to retain employees whose job was to pick up garbage (Tr. 59).

On February 17, Mayor Gavin Newsom announced an “aggressive anti-littering campaign” for the purpose of enforcing anti-litter ordinances. In conjunction with the announcement, the Mayor sent a letter to all City employees in classifications which, under the Police Code, were authorized to issue monetary citations to those who litter.<sup>4</sup> The letter directed the employees to attend a “mandatory two-hour training session” on February 24 in preparation for being “assigned and organized into appropriate citation teams that will be scheduled to conduct citation walks throughout the City, in the company of San Francisco Police Officers.” (Un. Ex. 1.)

The training meeting was conducted as scheduled on February 24. Although the Mayor’s letter had been sent to approximately 400 employees, only 250 attended the training. None of the SEIU employees from Public Works whose classes are listed among those authorized to issue litter citations were disciplined for failing to attend the training session or for not participating in subsequent citation walks. According to deputy director of Public Works Mohammed Nuru, at the meeting the attendees were provided a schedule of 42 citation walks, and were asked to sign up for four (Tr. 66, 69). The citation walks were scheduled primarily on Wednesdays, one in the morning and one in the afternoon, for various neighborhoods of the City.

In practice, according to Mr. Nuru, the walks last for three to four hours apiece. Normally, six to ten employees from the group who were asked to attend the training session show up for the walks, and they are divided into smaller groups of two to three, each accompanied by police officers or special patrol (Tr. 101). Although referred to by the City as

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<sup>4</sup> Police Ordinance No. 87-03, originally enacted in 1987 and amended in 2003, provides authority for various classes of employees, both inside and outside the SEIU bargaining unit, to issue citations to members of the public who litter. (City Ex. 1.)

“volunteers,” these employees participate in the citation walks while on paid City time, and with the permission of their respective departments (Tr. 105). The walks are led by management and/or supervisory employees from Public Works, who, according to Mr. Nuru, have written 90% of the citations that have been issued on these walks.<sup>5</sup> The employees from other departments have been asked to focus on only three of the anti-littering ordinances (out of 13 ordinances for which citations have been issued during the walks), and their purpose is primarily educational, as opposed to direct enforcement. Although the volunteers have issued some citations, none of them has been asked to testify at a court hearing or to perform an investigation (Tr. 67-68).

## **POSITIONS OF THE PARTIES**

### **The Union**

The Union argues that the City has violated the Work Preservation Agreement, section III.2.b.ii, by assigning the work of ECOs to other bargaining units. The Union insisted on this language to prevent erosion of the bargaining unit, and the City ultimately agreed to it. In addition to the contract right, PERB and the NLRB recognize the principle that a unilateral transfer of bargaining unit work outside the unit violates the duty to meet and confer.

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<sup>5</sup> The management and supervisory classifications within Public Works have long been authorized to issue litter citations under the Police Code. Mr. Nuru testified, however, that prior to the citation walks, most managers seldom issued citations and that he had personally issued possibly ten citations per year, as opposed to three or four per week, or more, issued by ECOs (Tr. 96-98).

The management and supervisory Public Works employees who have participated in citation walks include the following: 1312 Public Information Officer (IFPTE Local 21 bargaining unit); 5173 Asst. Supt. Of Street Cleaning and Tree Planting (Municipal Executive Association bargaining unit); 5190 Director of Public Works (MEA bargaining unit); 6230 Street Inspectors (Local 21 bargaining Unit); 7215 General Laborer Supervisor (Laborers Local 261 bargaining unit); 7281 Street Cleaning General Foreman (Local 261 bargaining unit). Of these classifications, the only class specification which lists enforcement of litter abatement laws as a specific job duty is that of the 7281 Street Cleaning General Foreman (Street Environmental Services Operations Supervisor). (See Ex. 5, attached to Union brief.)

Although the City now characterizes the employees who have participated in citation walks as “volunteers,” the Mayor’s letter stated that the training was “mandatory” and that they would be “assigned” to scheduled walks. Thus, bargaining unit work was “assigned” to others within the meaning of the Work Preservation Agreement. The employees were directed to participate; they did so on paid time; and there is no claim that management ever informed the recipients of the letter that the mandatory directive was withdrawn. The fact that management has not disciplined those who have not participated does not change the fact that the work was assigned. The 42 citation walks have proceeded in regular, systematic fashion as planned, and litter enforcement and education work have proceeded while ECOs have lost their jobs. The City failed to meet and confer prior to promulgating the anti-litter program, and the unilateral action caused economic harm to the ECOs and erosion of the bargaining unit to the Union.

It is undisputed that before the elimination of the ECO positions in January, 2005, they were the only employees who regularly performed the work of litter enforcement and education. The ECO job description details their litter enforcement duties, and no other job descriptions, with the minor exception of the 7281 job description, reference similar job duties. The anti-litter program participants who were not Public Works managers had not previously performed this type of work, and even if, as claimed by Mr. Nuru, they wrote few citations, they were still patrolling and performing educational work, and warning violators, all of which was formerly done by ECOs. Although Public Works managers may have occasionally issued litter citations in the past, under PERB precedent, if there are overlapping job duties with non-bargaining unit personnel, a unilateral transfer such that employees in the unit cease to perform the work in

question is a violation of the labor organization's rights. Here the City transferred all work previously performed by ECOs to non-bargaining unit employees, while eliminating the ECOs.

The City's reliance on Police Code section 38 is misplaced. Although that ordinance has always provided various classes with the authority to write litter citations, assignment of that work has been limited by the Union's contractual and collective bargaining rights. The parties have always used Civil Service job descriptions, not Police Code section 38, to discuss what constitutes bargaining unit work. Although section 38 has been in effect since 1987, until January 15, 2005, the listed classifications, with the minor exception of the 7281 position, did not reference litter enforcement, and none of those classifications regularly performed this work. Police Code section 38 does not reflect an agreement between labor and management that the listed classifications may be assigned the work, and there is no agreement or past practice to treat section 38 as a work assignment.

The Union contends that the City has violated both the Work Preservation Agreement and MOU paragraph 10 by unilaterally transferring ECO work outside of the bargaining unit. As a remedy, it is argued that the City should be ordered to cease and desist from assigning ECO work to employees in other bargaining units, and should reinstate affected ECOs with back pay and interest. **The City**

The City argues that since 1987 the authority to issue litter citations has been vested, by Ordinance 87-03, in various job classifications beyond those represented by SEIU. Therefore, the Union cannot claim that the job duty of issuing litter citations is exclusively within the bargaining unit, merely because it is spelled out in the 8280 ECO class job description. The

police ordinance does contradict the provisions of the labor agreement, and MOU paragraph 8 does not apply.

Due to fiscal problems, the City determined in January 2005 to change its approach to dealing with litter in the City, eliminating the 8280 classification and focusing public attention on the problem through citation walks by City employees who went into the neighborhoods to effect “behavioral change.” Forty-two such walks, lasting three to four hours each, were scheduled during the year, and during a nine month period 196 citations were issued. The issuance of a citation requires 10 to 15 minutes. Thus the total time for the walks in nine months was less than 168 hours, and the time spent issuing citations was less than 52 hours.

Although the 8280 job description references litter control and issuance of citations, the parameters of bargaining unit work as referred to in the Work Preservation Agreement are not confined to the Civil Service job descriptions. It is of compelling significance that the 8280 ECO job classification was eliminated by the City as of January 2005. Thus, when the Mayor initiated the anti-litter campaign calling for citation walks there was in fact no specific ECO job classification. Therefore, there was no current bargaining unit work confined to SEIU employees at the time the program was implemented, and the City properly relied on the police ordinance which had been in effect since 1987. At the same time, the City honored all provisions of the Work Preservation Agreement with respect to internal job placement, job retraining and assistance, etc.

The City has the contractual and legal right to lay off employees and to eliminate jobs within its civil service system, and the City met its obligation to meet and confer on the layoff



and job elimination issues. Under the management rights clause, the City determines the methods, means and personnel by which the City's operations are to be conducted. To the extent that the Union seeks reinstatement of laid off 8280s, only the Civil Service Commission has the authority to restore job classifications once they have been eliminated.

For the above reasons, the City argues that the grievance is without merit and should be denied.

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## **DISCUSSION**

### **A. The Work Preservation Agreement.**

The Union has argued that the City violated two separate provisions of the MOU, section III.2.b.ii of the 2003-2004 Work Preservation Agreement,<sup>6</sup> and paragraph 10 of the basic MOU, referencing the meet and confer obligations of the Meyers-Milias-Brown Act. Because the analysis under these two provisions is somewhat different, they will be addressed separately.

All Environmental Control Officers and Senior ECOs who remained employed by the Department of Public Works in January, 2005 were laid off on or about the 15<sup>th</sup> of that month. On February 17, 2005, Mayor Newsom announced the implementation of an "aggressive anti-littering campaign," including a mandatory training session for all employees authorized to issue anti-littering citations under the Police Code. Since 1987, Ordinance 87-03 (as amended) has authorized various City employees, both inside and outside the Local 790 bargaining unit, to

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<sup>6</sup> As stipulated by the parties, the Work Preservation Agreement remains in effect until June 30, 2006 (Tr. 9-10).

enforce the litter abatement code sections. As relevant to this proceeding,<sup>7</sup> the question is whether the use of non-SEIU-represented personnel to participate in citation walks under the Mayor's program constituted an assignment of current bargaining unit work outside the bargaining unit in violation of the Work Preservation Agreement.

Although the training session was announced as mandatory, employees who did not attend have not been disciplined. In addition, deputy Public Works director Nuru testified that employees who did attend the training were "asked" or "encouraged" to sign up for four of the scheduled 42 citation walks, but it is unclear if they were informed that their participation was required under penalty of discipline if they failed to sign up. Employees who have gone on citation walks, however, have done so on paid time, and have been released by their departments to do so. Whether these employees have been required to participate in citation walks under penalty of discipline is not determinative of whether their participation represents a job assignment. That they are acting as City employees, patrolling, educating citizens, and issuing some citations, on paid City time under a formal program organized by, and at the request of, the Public Works Department, and with the cooperation of their respective departments, establishes that this activity represents a job assignment.

The further questions are whether the work performed on citation walks represents bargaining unit work within the meaning of section III.2.b.ii of the Work Preservation Agreement, and if so, whether at the time the anti-litter campaign was initiated, it can be said that the work was "currently performed" by SEIU represented employees. The evidence shows that until January 2005, litter enforcement had been performed almost exclusively by ECOs and

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<sup>7</sup> See fn. 1, *ante*.

senior ECOs within the Public Works Department. The 8280 ECO class specification states that such employees will “patrol” assigned areas to “enforce compliance” with litter abatement codes, will issue written warnings and citations, will investigate complaints and interview witnesses, will testify in court, and will conduct educational campaigns to encourage compliance.

The City notes that most of the citations issued during the citation walks have in fact been written by Public Works management and supervisory personnel who have led the walks, rather than by the non-Public Works employees who have participated in the walks. It also points out that a relatively small amount of time has been consumed by the walks, and even less by the actual process of issuing citations.<sup>8</sup> However, ECOs, before they were laid off, did not spend all of their working time writing citations. They patrolled neighborhoods, talked to citizens and warned them about litter code violations, and engaged in educational activity. Although the format of the citation walks is different than the independent, day-to-day work of ECOs, the basic job functions are the same. In addition, although the non-Public Works employees have long been authorized under the Police Code to write litter citations, the City has offered no evidence to demonstrate that they have done so in the past, and they needed to be trained to carry out their new assignment. The non-Public Works employees have in fact written some citations on the citation walks, and they have generally performed functions that were previously assigned to ECOs.

Further, the extensive citation-writing by Public Works managers and supervisors during the citation walks represents a distinct assignment of that work to them, since as Mr. Nuru testified most of the employees in managerial classifications have only occasionally written

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<sup>8</sup> The City totals the amount of time for the walks over a nine month period as 168 hours. Since six to ten employees typically go on the walks, the actual man hours involved in the walks is a multiple of 168.

citations in the past. In addition, by leading the citation walks, these supervisors and managers have engaged in “patrolling” for the purpose of anti-litter code enforcement, a primary job duty of ECOs. All of the managerial and supervisory classifications who have led the walks are in fact represented in other bargaining units.<sup>9</sup> Therefore, the assignment of new citation-writing duties to those employees, in the context of leading the citation walks, also represents an assignment of work to other bargaining units.

The City’s primary contention is that since the employees on citation walks have long been authorized under the Police Code to write litter abatement citations, litter citation-writing does not constitute *exclusive* Local 790 bargaining unit work within the meaning of the Work Preservation Agreement. The ECO class specification, however, focuses exclusively on duties related to litter abatement code enforcement, and the City has not provided any non-Public Works job description that contains any reference to such duties. The only job description referenced by either party that specifically references litter abatement duties is that of a supervisory classification in the Public Works Department, that of 7281 Street Cleaning General Foreman, which lists litter abatement along with many other duties. By definition, “bargaining unit work” is a concept which arises out of collective bargaining, and its parameters are established by the collective bargaining agreement and the past practices of the parties interpreting and applying the agreement. The evidence is undisputed that both parties traditionally refer to Civil Service class specifications when a dispute arises as to work assigned to particular classifications.<sup>10</sup> While class specifications are not necessarily entirely up-to-date in

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<sup>9</sup> See fn. 6, *ante*.

<sup>10</sup> This arbitrator has issued at least two decisions involving out-of-classification claims by SEIU-represented employees in which a primary focus of the evidence has been interpretation of the relevant class specifications.

terms of all job duties, in the absence of any evidence that litter code enforcement has been regularly assigned to other classifications, it must be concluded that this is Local 790 bargaining unit work within the meaning of the Work Preservation Agreement.

Finally, it is argued that at the time the Mayor announced the citation walks, ECOs were not “currently” performing litter enforcement work, as required by section III.2.b.ii, since their positions had been eliminated and they had been laid off a month earlier. This argument cannot be accepted. Although the positions were eliminated, there is no evidence that the civil service classification had been rescinded.<sup>11</sup> That the ECOs had been so recently laid off before the organization of citation walks to perform work which they had performed until the time of their layoff is sufficient to satisfy the requirement that the work was currently being performed by SEIU represented employees. To conclude otherwise would permit an evasion of the clear intent of the section: to prohibit the erosion of the bargaining unit by reassigning work historically within its jurisdiction.

Also, it is no defense that the City had met and conferred with the Union about the *impact* of the layoff, and that it had fulfilled its obligations regarding the work of the Internal Job Placement Committee. As stipulated, the parties did not meet and confer concerning the subject-matter of the citation walks, which had not yet been announced (Tr. 12-13). The City has the managerial right to make the decision to lay off employees. That basic right, however, is limited by Section III.2.b.ii of the Work Preservation Agreement, which prohibits the City from assigning current bargaining unit work to non-SEIU-represented employees. Under the circumstances of this grievance, the City has violated that contractual requirement.

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<sup>11</sup> The City’s suggestion that restoration of the positions would require action by the Civil Service Commission is not supported by the evidence.

**B. Paragraph 10 – the meet-and-confer obligation.**

The Union also argues that the City violated its statutory obligation to meet-and-confer regarding proposed changes in working conditions, i.e. the removal of bargaining unit work, as protected by paragraph 10 of the MOU. In making this argument, the Union does not concede that it would have had any obligation to reach agreement over the reassignment of ECO job duties so long as the Work Preservation Agreement remained in effect. Since it has been concluded that the City violated the Work Preservation Agreement, it is not necessary to consider this issue in detail.<sup>12</sup> It is worth noting, however, that the case law cited by the Union establishes a bargaining obligation with respect to the transfer of bargaining unit work, and in this respect the cases indirectly provide additional support for the proposition that the transfer of ECO job duties outside of the bargaining unit violated the Work Preservation Agreement.<sup>13</sup>

**C. The remedy.**

As previously observed, the City has the basic managerial right to lay off employees, whether to save money or to eliminate job functions, or both. However, the layoff in this case resulted in the reassignment of bargaining unit work to non-bargaining unit personnel, in violation of the Work Preservation Agreement, raising the question of whether, as a remedy, the laid off ECOs and senior ECOs are entitled to reinstatement with back pay and benefits.<sup>14</sup> It is concluded that this would be the appropriate remedy; however, the scope of the remedy is

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<sup>12</sup> Also, the grievance did not allege a violation of paragraph 10.

<sup>13</sup> See *Calistoga Joint Unified School District*, PERB No. 744 (1989); *Desert Sands Unified School District*, PERB No. 1682 (2004); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300 (D.C.Cir. 2003).

<sup>14</sup> As previously noted, there is no evidence that the civil service classifications have been eliminated or that the restoration of the budgeted positions would require action by the Civil Service Commission. (See fn 11.)

unclear based on the record in this case. Although 42 citation walks were initially scheduled, it is unclear how many walks have been conducted, how many employees have participated, and how many employee-hours have been involved in the citation walks.<sup>15</sup> For this reason, the matter must be remanded to the parties to consider the number and identity of ECOs and senior ECOs whose work has actually been displaced by the citation walks, and who are therefore entitled to be reinstated and made whole.

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### **AWARD**

1. The City violated the Work Preservation Agreement with respect to the use of employees from non-SEIU bargaining units to participate in citation walks pursuant to the Mayor's February 17, 2005 announcement of a new anti-littering campaign.

2. As a remedy, Environmental Control Officers and Senior Environmental Control Officers laid off by the Department of Public Works in January, 2005 are entitled to be reinstated and made whole to the extent that their work was reassigned to non-SEIU represented employees through the citation walks. Consideration of the scope of the remedy is remanded to the parties, subject to the discussion in part C, above.

3. The Arbitrator retains jurisdiction with respect to implementation of the remedy.

Dated: March 31, 2006

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<sup>15</sup> See fn. 9, *supra*. In addition, the citation walks have involved a change in format for litter code enforcement work, and it is possible that the City may want to retain in some respects the citation walk approach. While ECOs are entitled, under the Work Preservation Agreement to participate in citation walks, this decision expresses no opinion as to whether, or under what circumstances, some aspects of the citation walks may be retained, subject of course to the constraints of the Work Preservation Agreement and paragraph 10.

Frank Silver, Arbitrator